

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

Respondent,

v.

K.A.J.,
DOB: 06/27/91

Appellant.

No. 62148-3-1

UNPUBLISHED OPINION

FILED: July 27, 2009

Schindler, C.J. — K.A.J. appeals her conviction in juvenile court for assault in the fourth degree. K.A.J. argues that the court erred in denying her motion to dismiss on the grounds that the State did not establish the *corpus delicti* of the crime. K.A.J. also argues that the prosecutor violated her due process rights by cross examining her about her post arrest failure to tell Officer Melton she acted in self defense. Independent corroborating evidence established the *corpus delicti* of the crime and supports the conclusion that the victim's injury was the result of criminal conduct. And while the prosecutor impermissibly commented on K.A.J.'s right to remain silent, because the error was harmless beyond a reasonable doubt, we affirm.

FACTS

On April 5, 2007, the victim's mother called 911. Auburn Police Officer David Melton said that he responded to the 911 call reporting an assault. Officer Melton

testified that he observed red marks on the victim's face. After talking to the victim, C.C., and her mother for a few minutes about what happened, they pointed out K.A.J. to Officer Melton. Officer Melton approached K.A.J. to talk to her and ask what happened. K.A.J. told Officer Melton she was upset because C.C. "had been telling other people – or calling her names to other people and that she struck her." After spending approximately 20 to 30 minutes talking to C.C. and K.A.J., Officer Melton took photographs of C.C.'s face. The photographs show that the marks on C.C.'s face were still red. Officer Melton arrested K.A.J. and read K.A.J. her Miranda rights.¹

The State charged K.A.J. in juvenile court with one count of assault in the fourth degree in violation of RCW 9A.36.041.² Officer Melton was the only State witness to testify at the fact finding hearing.

At the conclusion of the State's case, the defense moved to dismiss on the grounds that K.A.J.'s statements to Officer Melton were inadmissible because the State failed to establish the *corpus delicti* of fourth degree assault. The judge denied the motion and admitted the testimony.

So I believe that under the circumstances of this case, the corpus delicti challenge has to fail. What we do have is the evidence and the exhibits admitted that are consistent with the information attributed to the respondent indicating that she was being talked about and therefore struck the complaining witness in the face.

K.A.J. testified at the fact finding hearing. K.A.J. said that when she confronted

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

²RCW 9A.36.041. Assault in the fourth degree. (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another. (2) Assault in the fourth degree is a gross misdemeanor.

C.C. about calling her names, C.C. bumped K.A.J.'s shoulder and tried to hit her but missed. K.A.J. said in response that she hit C.C. in the face with a closed fist and slapped her a couple of times. During the cross examination of K.A.J., the prosecutor questioned K.A.J. about why she did not tell Officer Melton that C.C. tried to strike her first.

Q: And you said that the reason why you couldn't tell the officer this was because of Mrs. Castro's presence?

A: Well, it wasn't just her presence, but it was also because she kept interrupting.

Q: Okay. Now, Mrs. Castro wasn't there when you were placed in handcuffs and placed in the patrol car, correct?

A: Yes.

Q: Was Mrs. Castro in the patrol car with you?

A: No.

...

Q: Okay. So once you left the address and were transported to the Auburn Jail, was Mrs. Castro in the car with you?

A: No.

Q: Was Mrs. Castro at the precinct when you were being processed for the arrest for assault in the fourth degree?

The defense attorney objected, arguing that the questions improperly commented on K.A.J.'s post arrest right to remain silent. The court overruled the objection, allowing K.A.J. to "answer that precise question."

The court found K.A.J. guilty of assault in the fourth degree. In the written findings of fact and conclusions of law, the court found K.A.J.'s testimony that she acted in self defense credible but concluded the "use of force exceeded that which was necessary to defend herself."

ANALYSIS

Corpus Delicti

K.A.J. contends the trial court erred in denying her motion to dismiss because the State did not establish the *corpus delicti*. K.A.J. argues the State presented no independent corroborating evidence that the injuries depicted in the photograph were the result of a criminal act.

Under the *corpus delicti* rule, a defendant's confession is not admissible unless independent corroborating evidence establishes the *corpus delicti* of the crime. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). To establish the *corpus delicti* of fourth degree assault, the State had to present evidence independent of K.A.J.'s confession that (1) a specific injury occurred, and (2) K.A.J.'s criminal action caused the injury. State v. Mason, 31 Wn. App. 41, 48, 639 P.2d 800 (1982).

We review the trial court's *corpus delicti* determination *de novo*. State v. Pineda, 99 Wn. App. 65, 992 P.2d 525 (2000). The independent corroborating evidence may be either direct or circumstantial. State v. Rooks, 130 Wn. App. 787, 902, 125 P.3d 192 (2005). In assessing the sufficiency of the State's *corpus delicti* evidence, a reviewing court assumes the truth of the State's evidence and views all reasonable inferences in the light most favorable to the State. Rooks, 130 Wn. App. at 802-803 (citing Aten, 130 Wn.2d at 658).

The evidence need not establish the necessary elements of the *corpus delicti* beyond a reasonable doubt or even by a preponderance of the evidence; it is sufficient if there is *prima facie* evidence of the *corpus delicti*. Aten, 130 Wn.2d at 656. The *corpus delicti* is not established if the evidence supports both a criminal and a non-criminal cause. Aten, 130 Wn.2d at 659-660. However, if "one inference is

more consistent with the independent evidence than another, it might make the other inference less likely or reasonable.” Rooks, 130 Wn. App. at 804.

Viewing the reasonable inferences in the light most favorable to the State, the independent evidence supports the conclusion that the injuries depicted in the photographs were the result of a criminal act. C.C.’s mother called 911. Officer Melton responded to the 911 call reporting an assault. When Officer Melton arrived, C.C. and her mother immediately approached Officer Melton’s vehicle to tell him what happened. Officer Melton testified that he observed red marks on C.C.’s face. After speaking to Officer Melton for a few minutes, C.C. and her mother pointed out K.A.J. to Officer Melton, and he then talked to K.A.J. about what happened. The totality of the independent evidence leads to the conclusion that C.C.’s injuries were the result of a criminal act. We conclude that because the *corpus delicti* was established, the court did not err in denying the motion to dismiss and admitting K.A.J.’s statements to Officer Melton.

Harmless Error

K.A.J. also asserts that the prosecutor violated her constitutional rights by improperly questioning her about her post arrest silence.³ The State concedes that the prosecutor impermissibly sought to impeach K.A.J.’s testimony that she acted in self defense by questioning why she did not tell Officer Melton that C.C. tried to hit her first. However, the State contends the error was harmless.

A constitutional error is harmless if the appellate court is convinced beyond a

³ Prosecutorial comment on a defendant’s silence after arrest is fundamentally unfair and violates due process. Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

reasonable doubt that despite the error, any reasonable fact finder would have reached the same result. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). Constitutional error is presumed prejudicial and the burden is on the State to prove that it is harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing State v. Stephens, 93 Wn.2d 186, 190-191, 607 P.2d 304 (1980)).

K.A.J. does not challenge the trial court's findings of fact and conclusions of law. Unchallenged findings are verities on appeal. State v. Rodgers, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

The court's findings of fact state in pertinent part:

According to her own testimony, the Respondent was angry when she approached Castro and 'blew up' because Castro had been 'trash talking' about the Respondent for the previous six months.

At some point during the exchange, Castro nudged the Respondent with her shoulder and there is credible testimony that Castro tried (but failed) to strike the Respondent as well.

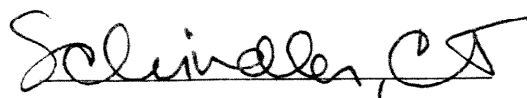
Following this, the Respondent struck Castro several times with multiple punches and slaps.

These blows left marks and redness on Castro's face and neck that were still visible sometime later.

The Respondent's use of force exceeded that which was necessary to defend herself.

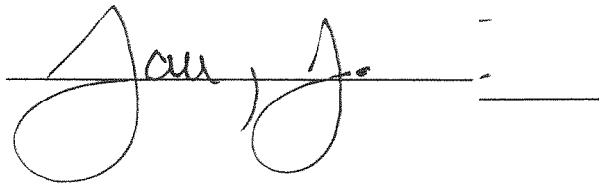
Because the unchallenged findings establish that the court accepted K.A.J.'s testimony that she acted in self defense but concluded that the force she used was excessive, we conclude the error was harmless beyond a reasonable doubt.

We affirm.

A handwritten signature in black ink, appearing to read "Schneider, CT". The signature is written in a cursive, flowing style with a large, stylized 'S' and a distinct 'CT' at the end.

No. 62148-3-I/7

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jay J. [unclear]", is written over a horizontal line. The signature is positioned on the left side of the line, and the line extends to the right.